No. 17-494

In The
Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Dakota

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Should the Court abrogate the physical presence standard of "substantial nexus" for state sales and use taxes, reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Wayfair Inc. and Overstock.com, Inc. each states that:

1. It has no parent corporation.

2. No publicly held corporation owns 10 percent or more of its stock.

Respondent Newegg Inc. states that:

1. It has the following parent corporation, Digital Grid (Hong Kong) Technology Co., Ltd.

2. No publicly held corporation owns 10 percent or more of its stock.

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CASES

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Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 63

Capital One Bank v. Comm'r of Revenue, 899 N.E.2d 76 (Mass.), *cert. denied*, 557 U.S. 919 (2009) 41

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 64

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 11, 43

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 42, 43, 61

Comptroller of the Treasury v. Wynne, 135 S.Ct. 1787 (2015) 42, 61

Dep't of Revenue v. Davis, 553 U.S. 328 (2008) 26, 57, 58

Direct Mktg. Ass'n v. Brohl, 135 S.Ct. 1124 (2015) 43

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939) 11

Gen. Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944) 11

Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993) 7, 62, 63, 65

Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010) 42

TABLE OF AUTHORITIES – Continued

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In re Appeal of Intercard, Inc., 14 P.3d 1111 (Kan. 2000) 44

In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi, 82 P.3d 804 (Haw. 2004) 44

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 62, 63

KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011) 41

Kimble v. Marvel Entm't, LLC, 135 S.Ct. 2401 (2015) 27, 59, 60

Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) 62

MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16 (2008) 42

Michigan v. Bay Mills Indian Cmty., 134 S.Ct. 2024 (2014) ..... *passim*

Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967) ..... *passim*

Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551 (1977) 11, 43

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 10

Newegg Inc. v. Ala. Dep't of Revenue, Ala. Tax Tribunal No. S 16-613 36

Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971) 8

TABLE OF AUTHORITIES – Continued

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Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 28

Payne v. Tennessee, 501 U.S. 808 (1991) 28

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 26, 57, 58

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) ..... *passim*

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) 65

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 10, 11

Standard Pressed Steel Co. v. Wash. Dep't of Revenue, 419 U.S. 560 (1975) 11

State by and through Heitcamp v. Quill Corp., 470 N.W.2d 203 (1991), *aff'd in part and rev'd in part, Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) 9

Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226 (W.Va. 2006), *cert. denied sub nom., FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007) 41

Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue, 483 U.S. 232 (1987) 11

United States v. Carlton, 512 U.S. 26 (1994) 65

Washington v. Gen. Motors Corp., 406 U.S. 109 (1972) 8

Wis. Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214 (1992) 44

TABLE OF AUTHORITIES – Continued

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FEDERAL STATUTES

47 U.S.C. § 151 (note) 14
H.R. 2193, 115th Cong. (2017-2018) 60
H.R. 2887, 115th Cong. (2017-2018) 60
P.L. 105-277, Sec. 1101(a)(2) (1998) 14
P.L. 105-277, Sec. 1102(a), (g) (1998) 14
P.L. 105-277, Sec. 1104(8)(a)(ii) (1998) 14
P.L. 114-125, Sec. 922(a) (2016) 14
S. 976, 115th Cong. (2017-2018) 60

STATE STATUTES

Cal. Rev. & Tax. Code § 6204 62
Mo. Rev. Stat. § 144.049 32
N.M. Stat. Ann. § 7-9-95 32
N.Y. Tax Law § 1133(a) 62
SDCL § 10-45-2 ..... 23, 57
SDCL § 10-45-2.4 23
SDCL § 10-45-4 23
SDCL § 10-45-5 23
SDCL § 10-45-22 23
SDCL ch. 10-64 23
SDCL § 10-64-1(10) 23
SDCL § 10-64-2 23

TABLE OF AUTHORITIES – Continued

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SDCL § 10-64-6 ..... 7, 63

Wash. Rev. Code § 82.08.053(2) 55

OTHER MATERIALS

Absolunet, *Top Ten Ecommerce Trends for 2018*, https://absolunet.com/en/top-10-ecommerce-trends-will-impact-retailers-2018/ 52

Advisory Commission on Electronic Commerce, *Report to Congress* (Apr. 2000) 1

Joseph Bishop-Henchman, *State Sales Tax Jurisdictions Approach 10,000* (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000/ 20

Black Friday Got Blacker for Users of Automatic Sales Tax Software, Sales Tax Data Link (Dec. 2, 2015), http://www.salestaxdatalink.com/blog/black-friday-got-blacker-for-users-of-automatic-sales-tax-software 34, 35

Ike Brannon, Michelle Hanlon, Erin Miller, *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – an Economic Analysis* (Mar. 2018), http://ssrn.com/abstract=3140948 40

European Commission, *Modernising VAT for cross-border B2C e-commerce* (Dec. 1, 2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_757_en.pdf 61

TABLE OF AUTHORITIES – Continued

Page

Federation of Tax Administrators, *Sales Tax Rates and Vendor Discounts* (Jan. 1, 2018), https://www.taxadmin.org/assets/docs/Research/Rates/vendors.pdf 38

Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03 50

Robert W. Goodlatte, *Statement of Chairman Robert W. Goodlatte* (Dec. 4, 2017), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf 59

Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217 (Apr. 19, 2010) 35

Institute for Professionals in Taxation, *Locally Administered Sales and Use Taxes* (2016) 19

Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html 2, 49

Naomi Jagoda, *Supreme Court to hear online sales tax case*, The Hill (Jan. 12, 2018), http://thehill.com/policy/finance/368788-supreme-court-to-hear-online-sales-tax-case 6

TABLE OF AUTHORITIES – Continued

Page

Terence Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, cnsnews.com (Mar. 22, 2018), https://www.cnsnews.com/news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hits-records-2017.pdf 52

Paige Jones, *Congressional Paralysis Unlikely to End in Time to Tackle Online Sales*, 87 State Tax Notes 432 (Jan. 29, 2018) 6

Larry Kavanagh, *Expert Report Concerning the Costs and Burdens for Remote Sellers to Comply with Sales and Use Tax Collection Obligations Imposed by Jurisdictions Throughout the United States, Including Alabama* (Aug. 28, 2017), https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf 37

MEC Global, *Spotlight on Webrooming* (May 2016), http://www.wpp.com/wpp/marketing/consumerinsights/spotlight-on-webrooming/ 51

Robert J. Moore, *How Many Ecommerce Companies Are There?*, blog.rjmetrics.com (June 18, 2014), https://blog.rjmetrics.com/2014/06/ecommerce-companies-are-there/ 37

National Tax Association Communications and Electronic Commerce Tax Project, *Final Report* (Sept. 7, 1999) 15, 17, 31

N.Y. Dep't of Tax. & Fin., Bulletin TB-ST-530 33

TABLE OF AUTHORITIES – Continued

Page

Leslie A. Pappas, *Amazon to Collect Tax on Third-Party Sales in Pennsylvania*, BloombergBNA (Mar. 5, 2018), https://www.bna.com/amazon-collect-tax-n57982089523/ 49

PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016) 51

Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.R.Rep. No. 565, 89th Cong., 1st Sess. (1965) 12

Ernan Roman, *Webrooming vs. Showrooming: Are You Engaging Both Types of Shoppers?*, CustomerThink (Feb. 23, 2017), http://customerthink.com/webrooming-vs-showrooming-are-you-engaging-both-types-of-shoppers/ 52

Alina Selyukh, *Overstock chairman has political missions in Washington DC and Utah*, Reuters (Aug. 11, 2015) 26

Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895 (1992) 13

Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125 50

TABLE OF AUTHORITIES – Continued

Page

Statement of Scott Peterson, former Director of the South Dakota Department of Revenue and former Executive Director of the SSUTA Governing Board, now Vice President U.S. Tax Policy, Avalara (Dec. 1, 2017), https://www.sana-commerce.com/us/blog-us/sales-tax-e-commerce-challenges/ 29

Statista, https://www.statista.com/statistics/304929/us-online-shopping-order-value/ 54

Janet Stilson, *Study Shows Prevalence 'Webrooming,'* Adweek (May 14, 2014), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/ 51

Streamlined Sales and Use Tax Agreement, Adopted November 12, 2002 and Amended Through December 19, 2017, http://www.streamlinedsalestax.org/index.php?page=modules ... 5, 18, 31

Streamlined Sales Tax Governing Board, Inc., *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us 5, 18

Streamlined Sales Tax Governing Board, Inc., *Streamlined Sales Tax Master Presentation* (Aug. 1, 2011) http://www.streamlinedsalestax.org/index.php?page=governing-board-presentation 20

John A. Swain and Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, National Tax Journal, Vol. LVIII, No. 3 (Sept. 2005) 20

TABLE OF AUTHORITIES – Continued

Page

United States Census Bureau, American Fact Finder, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=STC_2016_00A1&prodType=table 53

U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales 4th Quarter 2017* (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf 9

United States Government Accountability Office, *SALES TAXES: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017) ..... *passim*

Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/ 50

INTRODUCTION

In its quest to convince the Court to abrogate the physical presence standard of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the State has not overcome a basic truth: state sales and use tax systems remain inordinately complex and burdensome during the Internet era, just as they were before it began. In 2000, when policymakers perceived the potential for the Internet to revolutionize commerce, the congressionally-authorized Advisory Commission on Electronic Commerce ("ACEC") issued the States a clear directive: "substantial simplification and reform of the current tax systems" is a necessary precursor to the expansion of state taxing authority over remote sellers. Advisory Commission on Electronic Commerce, *Report to Congress* (Apr. 2000) ("ACEC Report") at 2. "Our system of federalism mandates that the burden of producing such a system falls on the states," the Commission concluded. *Id.* Today, state sales tax systems are, on the whole, even more complex.

As South Dakota rushed this case through the state court system, the United States General Accountability Office ("GAO") was conducting a detailed, fifteen-month study of the consequences if the physical presence rule were eliminated through federal legislation. The GAO examined the impact of such a change on state sales tax revenues and the resulting burdens that would be imposed on remote sellers by the nation's 12,000 state and local sales tax jurisdictions. *See* United States Government Accountability Office, *SALES TAXES: States Could Gain Revenue from Expanded Authority,*

but Businesses Are Likely to Experience Compliance Costs (Nov. 2017) ("GAO Report").[1] Notably, the State omits any reference to the GAO Report in its brief. The GAO's factual findings, however, refute each of the core contentions of the State's extended policy argument for abandoning the physical presence standard, demonstrating that there is no "special justification" for overruling *Quill* under established principles of *stare decisis*. *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2036 (2014).

First, rather than confirming widespread undercollection of state sales taxes, the GAO found that the States already receive tax on between 75 and 80% of *all* remote sales, and a *higher* percentage on sales by Internet retailers. GAO Report at 8-9, 39-44. In sharp contrast to the over $33 billion in annual uncollected sales tax claimed by the State (Pet. Br. at 35), the GAO concluded that the actual amount was *only about one-quarter to one-third as much*, or between $8.5 and $13.4 billion in 2017. GAO Report at 11-12. Importantly, the GAO Report is consistent with other market trends that indicate the level of uncollected sales tax is steadily declining, not increasing – most notably, as a result of the initiation of nationwide sales tax collection by Internet giant Amazon.com. Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017) ("Isadore"), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

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[1] The GAO Report was not issued publicly until December 18, 2017, eleven days *after* Respondents filed their brief in opposition to the State's petition.

Second, and even more significantly, the GAO Report undercuts the State's erroneous claim that sales tax collection software is the "silver bullet" to eliminate the burdens of multi-state compliance. The State offers no independent, third-party study regarding the burdens of compliance, and instead relies on promotional materials and a journal article prepared by the very firms that stand to profit most if *Quill* is overruled, for its claim that sales tax software cures all ills. The nonpartisan GAO found, in contrast, that the costs of sales tax compliance are manifold and significant: software installation, implementation, and integration; mapping of thousands of products to software categories; per-transaction software licensing fees; internal staffing and administrative costs; legal fees incurred in distant jurisdictions in connection with assessments and audits; and professional fees for keeping up to date on changes in the laws of thousands of taxing jurisdictions. *See generally* GAO Report at 15-27. Simply put, software "licensing fees are only one of multiple costs required to collect sales taxes in multiple states." *Id.* at 19.

Third, the GAO Report demonstrates that the State misperceives both the economic rationale and practical effects of the *Quill* standard. The fundamental calculus of the *Quill* Court was that the aggregate burdens associated with imposing multi-state tax collection on remote sellers were sufficiently great, and sufficiently harmful to the national economy, to warrant the retention of a rule that relieved certain retailers from collecting sales tax, while requiring other

vendors to comply. 504 U.S. at 313 and n.6. The GAO Report, together with other analyses, shows that these burdens remain high, while uncollected sales/use tax revenue nationwide is far lower than projected, and declining.

Overruling *Quill* would cause direct harm to those businesses most in need of its protection. The GAO concluded that state sales tax collection would prove particularly burdensome for smaller and medium-sized retailers that lack internal systems for multi-state tax compliance. GAO Report at 17. The largest Internet retailers, meanwhile, *already* collect the tax at rates approaching traditional bricks-and-mortar sellers. The GAO found tax collection among the top 100 Internet retailers is *between 87 and 96 percent*. *Id.* at 41. The so-called non-collectors are primarily small and medium-size companies, especially start-ups and regionally remote businesses for whom the Internet has enabled access to a national marketplace. Imposing the disparate requirements of 12,000 tax jurisdictions on such companies would effectively be a barricade across the Internet superhighway for thousands of companies, who would need to curtail their ambitions and limit their prospective markets. While South Dakota points to its own, self-imposed sales threshold of $100,000 for requiring sales tax compliance, its parallel threshold of 200 transactions would capture small sellers with far lower sales, and nothing would prevent other states from adopting even lower thresholds.

The State and several amici point to the Streamlined Sales and Use Tax Agreement ("SSUTA") as having

achieved the goal of greater uniformity and standardization of tax administration. The 202-page Agreement (including five appendices) is the product of a fifteen-year effort. It demonstrates the deep complexity of state tax systems and the extensive range of issues requiring simplification across states. *See* Streamlined Sales and Use Tax Agreement, Adopted November 12, 2002 and Amended Through December 19, 2017, http://www.streamlinedsalestax.org/index.php?page=modules. The SSUTA is to be commended, as a good faith, if incomplete, effort towards simplification. If all states had voluntarily adopted its provisions, the burdens on interstate commerce might be dramatically reduced. The problem, however, is that the signatories to the SSUTA, which include South Dakota, are states with only one-third of the nation's population. Streamlined Sales Tax Governing Board, Inc., *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us. The largest states, including California, Texas, New York, Florida, Illinois, and Pennsylvania, all refused to join, leaving the national system, as a whole, exceedingly complex.

The Respondents – indeed the entire direct marketing industry – are not unmindful of the interests the states have in obtaining sales/use tax revenue on transactions involving their residents, even if the states have mischaracterized the nature and dimension of this issue. The appropriate approach should be one that provides a balanced solution – simplification of sales tax administration in return for expanded state tax authority. Congress has the means to craft

such legislation and is actively considering such measures. *See generally* Brief of Amicus Curiae Robert W. Goodlatte, et al., in Opposition to the Petition (Dec. 4, 2017). Overruling *Quill*, without addressing the burdens on remote sellers, would produce adverse consequences and the potential for substantial market disruption. In fact, South Dakota's sole Congressperson has cautioned what the impact of overruling *Quill* would be in the absence of federal legislation: "If the Supreme Court rules in South Dakota's favor, it could become a marketplace free-for-all. A South Dakota small business, for instance, could be forced to comply with 1,000 different tax structures nationwide without the tools necessary to do so." *See* Naomi Jagoda, *Supreme Court to hear online sales tax case*, The Hill (Jan. 12, 2018) (quoting U.S. Rep. Kristi Noem (R.-S.D.)), http://thehill.com/policy/finance/368788-supreme-court-to-hear-online-sales-tax-case.

If *Quill* is overruled, the states will have no incentive to seek compromise federal legislation. Freed of Commerce Clause restraint on their taxing authority, states will oppose any congressionally-mandated restrictions on their cross-border taxing power. As one high-ranking state official acknowledged, "If the Supreme Court Rules in South Dakota's favor, effectively overturning the *Quill* decision, 'I don't see why states would want Congress to do anything.'" *See* Paige Jones, *Congressional Paralysis Unlikely to End in Time to Tackle Online Sales*, 87 State Tax Notes 432 (Jan. 29, 2018) (quoting Max Behlke, Director of Budget and Tax Policy for the National Conference of State

Legislatures). Moreover, there would be no requirement for states that have joined the SSUTA to remain members, let alone for other states to simplify their laws.

Of critical concern, overturning the physical presence standard would expose thousands of businesses that have relied upon it to crippling, retroactive liability for uncollected tax. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect . . . ") (ellipses added). Over 30 states have statutes already on the books requiring tax collection by sellers without a physical presence. *See* Appendix A. Only *Quill* stands in the way of states enforcing those laws. While South Dakota has disavowed such a backward-looking remedy in its statute (*see* SDCL §§ 10-64-6), other states have informed this Court that they may choose "to apply their laws retroactively." Brief for Colorado and 40 Other States, et al. ("States' Br."), at 19. A number of states have *already* begun to pursue back taxes based on an "economic presence" theory in anticipation of this Court overruling *Quill*. *See, e.g.*, Appendix C (letter dated Nov. 17, 2017, from the Connecticut DRS to The Swiss Colony, LLC). In most states, there is no statute of limitations for tax assessments against companies that did not file a sales tax return. *See* Appendix B.

A dispassionate analysis, like the one provided by the GAO, shows that current conditions do not reflect a crisis, although overruling *Quill* without needed

simplification may precipitate one. Abrogating *Quill* requires special justification. *Bay Mills*, 134 S.Ct. at 2036. None exists. Proper regulation of interstate commerce, as a matter of national economic policy, falls to Congress. The ruling of the South Dakota Supreme Court should be affirmed.

JURISDICTION

Even with regard to "important questions of vital national importance," *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 112 (1972), the Court carefully guards its jurisdiction against disputes in need of factual development. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498-99 (1971) (this Court is an "inappropriate forum" for addressing cases that have enjoyed no development in the lower courts). In choosing to "fast-track" its appeal through the South Dakota court system without a factual record, the Petitioner has caused doubts about the proper exercise of this Court's jurisdiction. *See also* Respondent's Brief in Opposition to Petition for a Writ of Certiorari ("Resp. Br. in Opp.") at 5-6, 12-18.

STATEMENT

The Petitioner presents a lengthy policy argument that *Quill* should be overruled. An extended statement is required to set the record straight.

I. Extent Of Ecommerce.

A restored perspective regarding the volume of retail ecommerce is in order. Electronic commerce, while growing rapidly, still represents only 9 percent of all retail sales, or about $453 billion. U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales 4th Quarter 2017* (Feb. 16, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. Traditional retail, which is also growing steadily, continues to comprise over 90 percent of the total market. Figures in the trillions of dollars for ecommerce, such as the $5.71 trillion figure cited in the Brief of Retail Litigation Center, Inc., et al. ("RLC Br."), at 5-6, include manufacturing and wholesale sales, which are *not* subject to state sales tax and are not relevant to this case. *See* Brief for the United States ("U.S. Br.") at 19-20. At the individual firm level, the largest traditional retailer, Wal-Mart, remains more than four times as large as Amazon.com, by far the biggest ecommerce seller. (Both collect sales tax on their Internet sales.) In fact, relevant data indicate that retail ecommerce comprises a smaller percentage of total retail sales today than catalog sales did in 1992 when *Quill* was decided. *State by and through Heitcamp v. Quill Corp.*, 470 N.W.2d 203, 209 (1991) ("mail order accounted for more than 15 percent of total sales nationally"), *aff'd in part and rev'd in part in Quill*, 504 U.S. 298. If ecommerce is a retail "leviathan," then traditional retail remains a colossus.

II. History Of Remote Sales/Use Tax Treatment.

The State insists that the physical presence rule is a relic of a bygone era, whose justifications lie on the far side of the "digital divide." Pet. Br. at 11. In fact, the justifiable concerns about unduly burdensome tax systems that animated the Court's decisions in *Bellas Hess* and *Quill* represent a continuing problem that spans both eras, and one that has generated even more intense interest among policymakers after the birth of the Internet. The continued consensus is that simplification of state sales tax systems must remain a paramount objective for any solution to the difficult policy questions that underlie whether, and under what conditions, to permit expanded state taxing authority over remote sales transactions.

As a constitutional matter, the restriction on a state's authority to compel collection of sales taxes by a company that lacks a physical presence in the state is long-standing. When, in 1967, the Court expressly recognized the "sharp distinction" between retailers with "outlets, solicitors, or property within a State" and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," the Court relied upon cases dating back to 1941. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 757-58 (1967) (citing *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)). Indeed, the Supreme Court has never held, in any case, that a sales, use, or comparable tax could be imposed upon a retailer that lacks a physical presence in a state. To the

contrary, a direct physical presence in the state, or in-state activities conducted by, or on behalf of, an out-of-state retailer, has been the hallmark of the Court's state tax decisions for decades. *See, e.g.*, *Quill*, 504 U.S. at 313-18; *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987) (third-party sales representative engaged in substantial activities in the state establishes nexus); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (an "interstate business must have a substantial nexus with the State before *any* tax may be levied on it") (italics in original); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556-58 (1977) (local office creates nexus) (surveying cases); *Standard Pressed Steel Co. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-63 (1975) (in-state employee creates nexus); *Scripto*, 362 U.S. at 211 (1960) (ten sales representatives soliciting orders in the state); *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 337-38 (1944) (traveling sales agents sent into the state); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 65-66 (1939) (in-state sales agents soliciting sales). What occurs inside a state's borders has always been the critical foundation for a state's taxing and regulatory authority; in short, borders matter.

A. 1967: *Bellas Hess*.

In applying this established principle in *Bellas Hess*, the Court was concerned that the national economy would suffer if the more than 2,300 state and local jurisdictions that imposed a sales tax were free to require tax collection by out-of-state businesses. Finding that the "impediments" to the conduct of interstate

commerce would be "neither imaginary nor remote," the Court explained:

> For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [an] interstate business in a virtual welter of complicated obligations. . . .

386 U.S. at 759-60 (internal footnotes omitted and brackets added). In reaching this conclusion, the Court quoted the Congressional Report on which it relied for its findings. "[I]t is clear that, if just the localities which now impose the tax were to realize anything like their potential . . . the recordkeeping task of multistate sellers would be clearly intolerable." *Id.* at 759 n.14 (citing Report of the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, H.R.Rep. No. 565, 89th Cong., 1st Sess. (1965), at 882) (brackets and ellipses added). Indeed, the multiplicity of jurisdictions, with their varying rates, tax bases, and requirements, is unique to the state and local sales tax system. No other form of taxation presents this same array and diversity of tax obligations.

B. 1992: *Quill.*

By 1992, the situation had significantly worsened. The number of taxing jurisdictions had soared to over 6,000. *Quill*, 504 U.S. at 313 n.6. The Court explained how North Dakota's attempt to compel tax reporting by an out-of-state retailer "illustrates well" the ways in which a use tax collection obligation could burden interstate commerce, because every jurisdiction could then follow suit. *Id.* The problem was not merely an issue of dozens of different rates, but also of different substantive requirements. Indeed, "even neighboring jurisdictions within the same state impose different classifications and rates, collect their own taxes separately, impose separate documentation requirements (such as the use of their own certificates attesting to tax exemption or that taxes have been paid), and conduct their own audits." Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895, 925-926 (1992) (cited by the Court in *Quill*, 504 U.S. at 313 n.6).

This was the sales tax system in place when Jeff Bezos began selling books over the Internet from his garage a few years later. But as electronic commerce quickly expanded, the complexity of state and local sales tax regimes only continued to increase.

C. 1997-2000: ACEC And NTA Project.

Policymakers soon took note of the inherent incompatibility between state sales tax systems and modern electronic commerce. In 1998, Congress enacted the

Internet Tax Freedom Act. *See* 47 U.S.C. § 151 note (made permanent in 2016, P.L. 114-125, Sec. 922(a)) ("ITFA"). Through the ITFA, Congress explicitly limited the authority of states and localities to impose "multiple or discriminatory taxes" upon electronic commerce, including sales tax collection obligations, that targeted transactions conducted online. P.L. 105-277, ITFA §§ 1101(a)(2), 1104(8)(a)(ii) (1998).

Congressional focus was not, however, limited to preventing discrimination. Through the ITFA, Congress established the Advisory Commission on Electronic Commerce, comprised of three executive branch officials, eight state and local government representatives, and eight businesspeople representing ecommerce companies, telecommunications carriers, and local retailers, with a broad mandate to study federal, state and local, and international taxation of transactions using the Internet. *Id.* §§ 1102(a), (g). The Commission conducted formal meetings, gathered information, interviewed experts, and heard from witnesses on all sides of the issues concerning taxation of ecommerce.

In its Report to Congress, issued in April 2000, the ACEC emphasized the fundamental complexity of state and local tax systems, and the need for simplification. ACEC Report at 2. The ACEC took note that there were over 7,500 state and local governments that levied a sales tax in 2000. *Id.* at 17. Admonishing states that it "should not be presumed that the collection of sales and use taxes on Internet transactions is an inevitability," the ACEC stressed the necessity of "substantial simplification and reform of the current tax

systems if they are to continue to remain viable in the 21st century." *Id.* at 2. In recommending that the "hallmark of the system should be simplicity, efficiency and fairness," the ACEC concluded:

> Our system of federalism mandates that the burden of producing such a system falls on the states. The proposals adopted by a majority of the Commissioners suggest giving the states five years to simplify their state and local transaction tax systems in a manner which would equalize the burdens of tax collection for local and remote sellers. . . . By eliminating any disparate burden on interstate commerce, states will have a pathway toward a system that extends their collection of existing state taxes to remote sellers.

Id. (ellipses added).

Concurrent with the work of the congressionally-authorized ACEC, the National Tax Association undertook its own Communications and Electronic Commerce Tax Project ("NTA Project"). *See* NTA Project, *Final Report* (Sept. 7, 1999) ("NTA Report"). Initiated in August 1997, the NTA Project brought together over 70 representatives of state and local governments (including representatives of the NGA, NCSL, FTA, MTC and NLC, all participating amici here), the business community, professional organizations, and academia to explore solutions to the state and local challenges presented by electronic commerce. NTA Report at 2. The NTA Project issued a consensus recommendation for simplification – that there should be

only one sales/use tax rate per state, for all commerce. The NTA Project also generated "a number of simplification suggestions that could reasonably seem to be implemented and make a significant reduction in the burden of sales tax administration." NTA Report, Executive Summary at ii, vi.

Notably, the NTA Project determined that "[s]*implification of the current sales and use tax administration is critical*, regardless of whether consideration is given to extending the duty to collect to certain remote sellers." *Id.* at vii (italics added).

The NTA's focus on state and local sales taxes allowed it to explore, in even greater detail than the ACEC, the complexities of the national sales tax system. Its review is telling. The NTA Report addressed the following areas in need of simplification: differing registration forms and requirements (*id.* at 54); multiple tax returns and differing filing and remittance requirements (*id.* at 55-56); inconsistent rules for bad debts and other deductions (*id.* at 56-58); varying refund claim procedures (*id.* at 59); widely differing standards and recordkeeping requirements for documenting and administering exempt sales (*id.* at 59-62); consumer payments by check and potential vendor liability for underpayment (*id.* at 62-63); inconsistent tax treatment of shipping charges, including taxability, administration, and measure (*id.* at 64); burdensome and expensive audits in multiple jurisdictions (*id.* at 64-66); cumbersome assessment and appeals processes (*id.* at 66-68); and inadequate vendor compensation for

the costs of compliance, including none at all in nearly 20 states (*id.* at 69-70).

The NTA was unequivocal in its assessment of the steps necessary to give consideration to extending the duty to collect sales tax to remote sellers:

> State and local sales taxes and their administration are confusing and burdensome. The complexity of today's sales tax arises from the interaction between the sovereignty of states in our federal system and the limitations imposed on that sovereignty by the U.S. Constitution in support of a national market. In current circumstances, the states should reexamine and coordinate their decentralized tax systems to reduce administrative burdens.

NTA Report at 49.

D. 2002 To The Present: SSUTA To The GAO.

The Streamlined Sales and Use Tax Project grew directly out of the NTA Project. It reflected a "hybrid" approach under which "[i]nterested states could develop a multistate tax compact creating a harmonized tax system," so that Congress could determine whether to authorize participating states to require sales tax collection by remote sellers. *Id.* at 80. Such a system, while recognizing state autonomy, would retain Congress' "appropriate control over the jurisdictional reach of state tax systems and protect interstate commerce from undue burdens due to inconsistent state tax practices." *Id.*

The Streamlined Project crafted the terms of a comprehensive agreement that was adopted in November 2002. The SSUTA's avowed purpose is "to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance." SSUTA § 102. Today there are 24 member states which together comprise approximately 31 percent of the population. Streamlined Sales Tax Governing Board, *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us.

Like the NTA Project, the SSUTA illustrates the complexity and variability of state sales tax systems across the United States. By its own account, the SSUTA addresses ten different general subject areas of state sales tax systems: state level administration of tax collections; uniformity in state and local tax bases; uniformity of tax definitions; centralized registration; simplification of state and local tax rates; uniform "sourcing" rules; simplified administration of exemptions; simplified returns; simplified tax remittances; and consumer privacy. *Id.* Within these broader subject areas, the agreement covers topics of bedeviling complexity for multi-state sellers, such as sales tax "holidays;" tax "caps" and thresholds limiting, or triggering, sales tax on particular products; "bundled" transactions in which products and services subject to different tax treatments are sold together; and special rules for digital products. *See* SSUTA, Art. III.

The SSUTA requires 202 pages to address all of the complexities. It has five appendices, including "libraries" of definitions, interpretations, and tax administration

practices. *Id.* Apps. C, D, and E. It has been amended dozens of times and numerous working groups address the many, varied, and complex issues of tax administration that arise.

The SSUTA simplification effort has yielded some dividends. The SSUTA has attracted over 3,800 registrants, many of them multi-channel retailers or remote sellers collecting tax on Internet or catalog sales that have agreed to collect tax in the SSUTA states. *See* Brief for *Amicus Curiae* Streamlined Sales Tax Governing Board, Inc. at 9.

But by the most important measure – state participation – the SSUTA has failed in its objective to simplify the complexity and burdens of state tax systems nationwide. States representing nearly seventy percent of the United States population are *not* members of the SSUTA. None of the several largest states – California, Texas, New York, Florida, Illinois, Pennsylvania – are members. None of the states with local "home rule" jurisdictions, which generate the greatest levels of complexity and compliance burden[2] – including

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[2] "There are complexities associated with collecting local sales taxes under any regime, even those that are administered by a state agency. Locally administered sales taxes represent a special case in this regard because a taxpayer is required to interact separately with each local government with which it is required to file and because the locally administered taxes often differ materially from the counterpart state tax and from one another, even within the same state." Institute for Professionals in Taxation, *Locally Administered Sales and Use Taxes* (2016), at 4.

Alabama, Alaska, Arizona, Colorado, Idaho, and Louisiana – are members.

As a result, the commendable simplification measures promoted through the SSUTA have not appreciably alleviated the burdens that would be imposed upon remote sellers in the absence of the *Quill* rule. To the contrary, overall complexity has continued to grow. In September 2005, leading commentators assessing the prospects of the SSUTA noted that "structural flaws in the [sales] tax – present since its inception – are increasingly highlighted by an ever expanding global, service-oriented, and digital economy. Preeminent among these flaws has been the complexity of compliance with a multiplicity of non-uniform state and local sales tax regimes." John A. Swain and Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, National Tax Journal, Vol. LVIII, No.3 (Sept. 2005), at 605. Six years later, the Executive Director of the SSUTA declared that "[c]ompliance with sales tax laws by multi-state corporations is too complex." *Streamlined Sales Tax Master Presentation* (Aug. 1, 2011), at 4, http://www.streamlinedsalestax.org/index.php?page=governing-board-presentation. And in 2014, the number of state and local tax jurisdictions reached 10,000. Joseph Bishop-Henchman, *State Sales Tax Jurisdictions Approach 10,000* (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000/.

In 2016, two United States Senators asked the GAO to study the remote sales tax issue. GAO Report at 1. Over a fifteen-month period, the GAO conducted

independent research and interviewed officials from state revenue agencies, subject matter specialists, trade associations, and a wide variety of retailers making remote sales, regarding the real-world experience of sales tax collection. *Id.* at 2-3. In December 2017, it published its Report.

The GAO began by noting that across the 46 states (including the District of Columbia) that have a sales tax, the estimated number of local jurisdictions is as high as 12,000. *Id.* at 3. It found that the cost of both collecting and remitting sales tax rises as a company faces increased exposure to additional tax jurisdictions. *Id.* at 16. Furthermore, "[a]s the number of jurisdictions for which a business collects taxes increases, the amount of administrative work also increases." *Id.*

The GAO found that the burdens go far beyond buying sales tax compliance software, making it no "cure-all" for retailers' compliance burdens. Moreover, the initial costs of software set-up are high, especially for businesses not already using software for multistate tax collection. *Id.* at 17. Retailers need to engage in expensive "mapping," coding, customization, and system integration, which requires, among other things, coding all of a retailer's products for applicable taxation categories. *Id.* at 17-18.

The GAO also found substantial costs *not* related to software implementation and integration. Multistate sellers may be under perpetual audit, especially in non-SSUTA states. "A representative from the tax

department of one company with nexus in most states said that auditors return every few years to audit the company and that they are currently contending with 8 to 10 audits from different tax authorities." *Id.* at 21. Moreover, some audits last for years. *See id.* (referencing a business that had just dealt with an expensive, three-year audit). Remote sellers reported that they simply do not have the resources to comply with similar audits from multiple jurisdictions. *Id.*

In sum, the GAO Report tells a very different story about the burdens of multi-state tax compliance in the modern economy than the Petitioner describes in its brief. The states have not collectively responded to the advice and direction of the congressionally-sponsored ACEC and the nonpartisan NTA by simplifying and making more uniform their tax systems. The GAO's findings demonstrate that, substantively and practically, the complex and burdensome nature of the U.S. sales tax system that existed in 1992, compounded by the ever-expanding number of tax jurisdictions, still exists today. In arguing that remote sellers can now easily and inexpensively comply with nationwide sales tax obligations, neither South Dakota nor its amici even mention the GAO Report.

III. South Dakota Sales Tax.

The South Dakota sales tax is imposed upon "the privilege of engaging in business as a retailer," measured by the gross receipts from sales of tangible personal property, products transferred electronically, and

services. SDCL §§ 10-45-2, 10-45-2.4, 10-45-4, 10-45-5. There is no provision expressly requiring collection of the tax, but retailers "may add the tax imposed by this chapter to the price of their product or service." *Id.* § 10-45-22.

In March 2016, South Dakota enacted Senate Bill 106, "An act to provide for the collection of sales taxes from certain remote sellers" (the "Act"), now codified at SDCL chapter 10-64. The Act amended the sales tax code to require any seller that does not have a physical presence in the state to report sales tax based on statutory thresholds of $100,000 in sales or 200 transactions for delivery into South Dakota in the previous or current calendar year. *Id.* § 10-64-2. In devising these standards, the legislature found that "a decision from the Supreme Court of the United States abrogating its existing doctrine" would be necessary for the Act to be enforced. *Id.* § 10-64-1(10).

IV. Proceedings Below.

The State filed suit in April 2016, targeting the Respondents while conceding they were acting lawfully in not collecting sales tax. *See id.*; Complaint ¶ 24. In their Joint Answer, the Respondents admitted that each of them: (a) lacks a physical presence in South Dakota; (b) had gross revenue in 2015 from South Dakota sales in excess of $100,000, and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (c) is not registered to collect South Dakota sales tax. The Respondents

denied all other factual assertions in the Complaint, including the "legislative findings" that supported the Act. Defendants' Joint Answer ¶¶ 43-50. No other facts are established by the proceedings below. *See* Resp. Br. in Opp., Addenda A & B (Statement of Undisputed Material Facts and the State's response).

In March 2017, the circuit court awarded summary judgment to the Respondents on the grounds that the Act is directly at odds with *Quill*. Pet. App. B. On September 13, 2017, the South Dakota Supreme Court, finding "no distinction between the collection obligations invalidated in *Quill* and those imposed by Senate Bill 106," affirmed the entry of judgment for the Respondents. Pet. App. A.

SUMMARY OF ARGUMENT

Under the well-established doctrine of *stare decisis*, overruling *Quill* requires "special justification." *Bay Mills*, 134 S.Ct. at 2036. Multiple factors demonstrate that the State cannot meet this high burden.

As the State acknowledges, reliance by remote sellers on the physical presence standard based on concerns about the inordinate burdens of multi-state tax compliance is "legitimate." Pet. Br. at 55. Contrary to the State's contention, inadequate sales tax software and faulty tax rate "look-up" tables do not eliminate the most costly and burdensome tasks of compliance required by the excessively complicated U.S. sales tax

system. Moreover, software adds new expenses to the process.

The *Quill* Court did not misunderstand the clear economic calculus before it. Rather, it made a considered judgment that the aggregate burdens of nationwide sales tax collection, and their impact on the national economy, justified the retention of the physical presence rule. That economic assessment still makes sense today and is not minimized by the State's flawed assumption that the real-world burdens of multi-state sales tax compliance do not exist.

No decision of this Court has ever questioned the holding of *Quill*; in fact, the Court has cited it favorably since 1992. Likewise, no lower court has questioned *Quill's* conclusions with regard to state sales/use taxes, as opposed to other kinds of taxes that impose lesser compliance burdens. Indeed, the physical presence test is straightforward and readily applied in the vast majority of circumstances. Limited litigation regarding *de minimis* physical presence does not undermine the rule's "workability."

Changed conditions in the retail marketplace also cannot justify the abrogation of the physical presence rule where the constitutionally-significant conditions – undue burdens derived from excessively complicated state sales tax systems – remain unchanged. The State, moreover, mischaracterizes market conditions and trends that show, contrary to the State's hyperbolic predictions, that uncollected revenues are far lower than previously estimated and *declining*, as

electronic commerce is increasingly dominated by large, tax-collecting, omni-channel retailers.

Neither alternate standard presented by the State and its amici is viable. Individual state sales and transaction thresholds, like those contained in the Act, would be the antithesis of a settled rule and would eliminate any meaningful limit on state taxing authority. In addition, the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), is incompatible with the nationwide focus required for assessing the impact of inconsistent state sales tax regimes on interstate commerce. Courts are ill-equipped to perform the complex economic analyses such a test would require. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 353-56 (2008) (rejecting *Pike* balancing due to the "unsuitability of the judicial process and judicial forums" for predicting the economic consequences of changes to established market rules).

Instead, Congress is the institution best-suited to resolve the competing interests in remote sales tax collection and to select the proper policy outcome – a goal that the Respondents and almost all remote sellers support. Alina Selyukh, *Overstock chairman has political missions in Washington DC and Utah*, Reuters (Aug. 11, 2015) (discussing Overstock's support for federal legislation to address the "patchwork of laws that just makes it hard to do business"). Overruling *Quill* would complicate, if not prevent, a congressional solution. Absent the physical presence standard, the states would no longer be interested in compromise. Jones, 87 State Tax Notes 432. The potential for severe economic

disruption is great. Small businesses seeking access to a national market, not the massive multi-channel retailers that already report sales tax across the country, will be harmed most by the new compliance burdens, new barriers to entry, and new obstacles to growth.

Overruling *Quill* also presents even "thorn[ier] questions concerning the retroactive application" of sales taxes than were present in *Quill*. 504 U.S. at 318 n.10 (brackets added). Over 30 states have laws that would support state efforts to impose retroactive liability on sellers that relied upon *Quill*. *See* App. A. Some states are already seeking to impose back taxes on sellers with no physical presence, in anticipation of *Quill* being overruled. *E.g.*, App. C. The States have acknowledged to the Court that they may pursue such claims. No meaningful impediment would stand in their way – but Congress can craft legislation that would allow states that simplify and make more uniform their systems to require prospective collection.

ARGUMENT

I. There Is No Special Justification For Overruling *Quill*.

The doctrine of *stare decisis* is "a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015) (quoting *Bay Mills*, 134 S.Ct. at 2036). Adherence to prior precedent is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles,

fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Bay Mills*, 134 S.Ct. at 2036 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). A party arguing that precedent should be overruled must therefore show that there is "special justification" for abrogating the decision. *Id.* (citation omitted).

Furthermore, as Justice Scalia noted in *Quill*, *stare decisis* applies with enhanced strength with respect to the Court's dormant Commerce Clause decisions because Congress "remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Since the legislative branch "exercises primary authority in this area," *stare decisis* has "special force." *Bay Mills*, 134 S.Ct. at 2036 (citing *Patterson*, 401 U.S. at 172-73) (addressing issue of tribal sovereign immunity).

A. Retailers Have Justifiably Continued To Rely On *Quill*.

There can be no doubt that remote sellers employing a wide range of direct marketing methods (catalog/mail order, television/infomercial, telemarketing, Internet) have continued to rely upon *Quill*. And with good reason. As South Dakota's own former, long-time Director of Revenue recently acknowledged, state and local sales tax compliance involves differing rules for "what gets taxed, how much tax to apply, and how to file a return and pay the tax," all of which "greatly

increases the complexity." Statement of Scott Peterson, former Director of the South Dakota Department of Revenue and former Executive Director of the SSUTA Governing Board, now Vice President U.S. Tax Policy, Avalara (Dec. 1, 2017), https://www.sana-commerce.com/us/blog-us/sales-tax-e-commerce-challenges/.

Perhaps most importantly, the physical presence rule has permitted start-ups and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection.

2. Retailers Were Entitled To Take This Court At Its Word.

The State concedes that retailers have a legitimate reliance interest with respect to inordinate compliance costs, Pet. Br. at 55, but argues that remote sellers should have divined from *dicta* in *Quill*, as well as from congressional authority to legislate in this area, and from the independent obligation of consumers to self-report use tax, that the physical presence standard for sales tax collection could not last. *Id.* at 54-55. These arguments would counsel parties to distrust the rule of law, but Justice Scalia has already provided the answer to such weightless contentions in his concurrence in *Quill*. It would be fundamentally incompatible with *stare decisis* to "demand that private parties anticipate" the overruling of precedent and to "visit economic hardship upon those who took us at our

word." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) ("reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance") (italics in original).

2. Reliance In Light Of Continued Compliance Burdens Is Plainly Reasonable.

The State admits that reliance on *Quill* is proper – indeed, "legitimate" – if the burdens of multi-state tax collection remain excessive. Pet. Br. at 55. This admission is telling, because every considered assessment in the Internet era (ACEC, NTA, SSUTA, GAO) has concluded that sales tax systems remain exceedingly complex. The concerns regarding undue burden that animated the decision in *Bellas Hess* and its retention in *Quill* are as valid today as they were in 1967 and 1992.

a. Sales Tax Software Does Not Eliminate The Compliance Burdens.

The State acknowledges that the number of tax jurisdictions continues to grow and does not dispute that they have disparate substantive and administrative requirements. The only response that the State presents to such inordinate complexity is software. In effect, no matter how monstrously complex the states choose to make their sales tax codes, software (or, perhaps, cloud computing) is the "silver bullet" to slay the beast.

Even the proponents of the "super-software-fix" do not argue that software reduces the complexity. Instead, they argue that software makes complexity irrelevant. While sales tax software and tax rate "look-up" tables may help remote sellers address one discrete issue, they present a range of costs of their own, and fail to address many of the most burdensome aspects of multi-jurisdiction tax collection. Indeed, software alone barely scratches the surface.

The NTA Report and the SSUTA demonstrate the shortcomings of software as a purported solution to the burdens of compliance with 12,000 jurisdictions nationwide. Challenges unaddressed by software include: varying and complex rules for "sourcing" products and, in particular, services, to the proper jurisdiction; non-uniform product definitions across states, and even within states for those having "home rule" jurisdictions; special tax "caps" and thresholds for particular products; different provisions for defining, substantiating, and taxing "bundled" transactions; specific requirements for proof of, and record keeping for, exempt transactions; inconsistent rules for bad debts and deductions; varying refund claim procedures; complexities associated with consumer payments by check;[3] inconsistent tax treatment of shipping charges; and cumbersome and expensive audits and appeal processes. *See generally* SSUTA, Art. III; NTA Report at 54-70.

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[3] *See Amicus Curiae* Brief of American Catalog Mailers Association in Opposition to the Petition (Dec. 7, 2017), at 7 ("On average 11% of catalog purchases are paid by check, and some catalog sellers receive checks for more than 30% of their sales.").

A few examples illustrate the point. Twelve states have adopted sales tax "holidays," short term exemptions from tax for selected categories. In at least three states, however, local jurisdictions within the state can opt out of participation in the holiday, so the exemptions may apply for only certain localities. Even more daunting, different states apply the exemption to different categories and subcategories, and further define the same general categories and subcategories differently. States differ as to whether the holiday applies to the time of the order, time of the shipment, or time of the payment. Specific "back-to-school" tax holidays are authorized in several states; some cover clothing but exclude clothing accessories; some include footwear, while others do not; some include school supplies, but define the covered products differently; many set caps on the maximum exempt amount of purchases of particular products. The variations are nearly endless. *See, e.g.*, Mo. Rev. Stat. § 144.049; N.M. Stat. Ann. § 7-9-95.

State and local taxes often treat the same transaction differently. Take the tax treatment of clothing in New York, which has 84 local sales tax jurisdictions:

> Clothing, footwear, and items used to make or repair exempt clothing sold for less than $110 per item or pair are exempt from the New York State 4% sales tax, the local tax in localities that provide the exemption, and the ⅜% Metropolitan Commuter Transportation

> District (MCTD) tax within exempt localities in the MCTD.

N.Y. Dep't of Tax. & Fin., Bulletin TB-ST-530. Put simply, items of clothing and footwear costing under $110 are exempt from New York's 4% state sales tax. However, local jurisdictions can require merchants to charge local sales tax on clothing costing less than $110. Under this provision, if *Quill* is overruled and a small woolen garments manufacturer in Minnesota sells a sweater to a buyer in New York City, which follows the state tax exclusion for clothing, no sales tax is charged. However, the same sale to a customer in White Plains, in Westchester County, must include the 4% local sales tax, because Westchester is among the majority of New York counties that does not exempt clothing under $110. Westchester County also charges the 0.375% MCTD tax. So for this transaction, the Minnesota seller would not charge its customer the 4% New York state sales tax, but it would charge the 4% local sales tax rate and the 0.375% MCTD tax.

It gets more confusing if the Minnesota company sells a sweater for $100 and a coat for $150 as part of the same transaction. On a sale to a Manhattan customer, there would be zero sales tax on the sweater, but the full New York City sales tax rate of 8.875% would apply to the coat. On a sale of those same items delivered to a buyer in White Plains, the seller must charge the 4% Westchester County tax and the 0.375% MCTD rate on both items, and would be required to charge 4% New York state sales tax on the coat. There is no software solution for this compliance obstacle. A remote

seller would need to code and compute manually the applicable tax and hope it does so correctly.

The administration of exemption certificates is another challenge. In order to avoid the obligation to collect tax on an exempt purchase, a retailer must obtain the proper form of tax exempt certificate from the purchaser. Categories of tax exempt sales include sales-for-resale, sales to exempt purchasers (such as charities and schools), and sales of products for an exempt use (such as a specific agricultural or manufacturing purpose), among others. With the exception of sales-for-resale, each of these categories is likely to be defined differently from state to state. In addition, while there are some multi-state certificates accepted in certain states, many states require their own, particular forms be used to substantiate the exempt purchase.

Beyond the many problems left unaddressed altogether, there are other shortcomings of sales tax software. Like any complex product, software includes errors and occasionally breaks down, potentially with dramatic consequences. Avalara, arguably the market leader in sales tax compliance software, suffered a software failure on one of the busiest shopping days of the year – the Friday after Thanksgiving. *See Black Friday Got Blacker for Users of Automatic Sales Tax Software*, Sales Tax DataLink (Dec. 2, 2015), http://www.salestaxdatalink.com/blog/black-friday-got-blacker-for-users-of-automatic-sales-tax-software. Retailers reported that the "software created error messages during check out so frequently that many sellers had to turn the

software off," preventing tax collection and exposing them to liability. *Id.*

The State touts the free, tax rate "look-up" service offered by TaxCloud as accurately providing the sales tax rate for any address in the United States based on a simple search. Pet. Br. at 45 (inviting one to "try it"). In fact, it takes only a few moments to discover that TaxCloud is rife with errors. For example, TaxCloud's look-up function produces incorrect sales tax rates for addresses across South Dakota, including for the State Capitol Building (500 E. Capitol Avenue in Pierre) and the well-known Wall Drug Store (500 Main Street in Wall). *See* Appendix D (examples of TaxCloud errors in South Dakota). If TaxCloud generates multiple errors for South Dakota on a cursory review, it is certain to produce thousands of errors nationwide.

The problem, of course, is that the incredible number and variation of local taxing jurisdictions – including not only cities and counties, but also parishes, stadium districts, transportation districts, water districts, scientific and cultural facilities districts, and police jurisdictions, among others – often do not correspond with zip codes or even municipal or county boundaries, making tax compliance difficult, at best. *See* Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217-22 (Apr. 19, 2010) (addressing the challenges associated with local taxing jurisdictions).

b. Sales Tax Software Adds To The High Costs Of Compliance.

Sales tax software also adds new categories of expense. At best, it tends to convert requirements that were previously impractical into tasks that are extremely expensive. The GAO Report is instructive. In addition to license fees and "labor-intensive product-mapping work" just to get the process started, there are integration costs. GAO Report at 17-20. Moreover, "businesses using customized software or software that is not in common use may see higher costs to integrate these systems." *Id.* at 18. Merely using software may prove surprisingly expensive. Since each time an online customer changes goods in a shopping cart, a new look-up request must be made to the remote software provider's database, "businesses must account for both completed transactions as well as how often customers change" products in the website's shopping cart. *Id.* at 19. "Our market research found licensing costs . . . as high as $200,000 per year for unlimited information requests." *Id.* (ellipses added).

Other analyses demonstrate that the implementation and integration of sales tax software, as well as the ongoing license and maintenance costs for such a product, are extremely high. Respondent Newegg submitted an expert report concerning the costs of compliance in a tax appeal it filed to contest an assessment of use tax under Alabama's 2016 "economic nexus" rule. *Newegg v. Ala. Dep't of Revenue*, Ala. Tax Tribunal No. S 16-613 ("*Newegg v. Ala. DOR*"). The report explains that sales tax software is not "plug-and-play"

but involves considerable expense for a retailer to adapt new software to its existing systems and maintain over time. Newegg's expert projected the average cost for a small to medium-sized business for implementation and integration of software at between $80,000 and $270,000. Larry Kavanagh, *Expert Report* (Aug. 28, 2017), available at https://truesimplification.org/wp-content/uploads/2017-08-29-Kavanagh-Report.pdf. The report describes even higher costs for a larger retailer, like Overstock or Newegg. *Id.* On an annual basis, the report estimates costs for a small to medium-size retailer of $57,500 to $260,000.

There are approximately 90,000 online retailers of meaningful scale (over $1 million in sales) in the United States. Robert J. Moore, *How Many Ecommerce Companies Are There?* (June 18, 2014), https://blog.rjmetrics.com/2014/06/18/how-many-ecommerce-companies-are-there/. At these levels of expense, assuming 90,000 affected retailers and $150,000 in annual costs, the aggregate burden associated with managing the tax collection and remittance function (a total of $13.5 billion) is enormous, even before adding the costs of administration and audit defense.

The so-called "free" software that the State and its amici reference in their briefs is primarily, if not exclusively, associated with the SSUTA states, because the SSUTA allows software providers to become "certified" and receive compensation from the participating states based on the taxes collected and remitted using the certified software. The SSUTA, however, does not cover integration costs or compensate retailers for the

time they must devote to implementing and maintaining such software, or for lost sales they suffer when the software does not function properly. Still, this provision for compensation represents a reasonable, if partial, simplification measure. The problem is evident, however: given the SSUTA's limited membership, no such provision is made by states representing nearly 70 percent of the population.

Although South Dakota claims that other states provide vendor discounts to compensate retailers for tax compliance costs, the amounts are generally very low (1 to 3 percent of tax collected) and subject to caps that leave them woefully short of a retailer's actual costs. Federation of Tax Administrators, *Sales Tax Rates and Vendor Discounts* (Jan. 1, 2018), https://www.taxadmin.org/assets/docs/Research/Rates/vendors.pdf. South Dakota's rate, for example, is 1.5 percent of the tax collected, subject to a $70 per month cap. *Id.*

None of this expense accounts for the largest potential cost if retailers are required to report tax in every state and hundreds of "home rule" local jurisdictions: audits, assessments, and appeals. If *Quill* is overruled, multi-state retailers can expect multiple simultaneous audits. *See* GAO Report at 21. Responding to audits and assessments requires companies to incur the cost of outside professionals, such as accountants and attorneys in distant states, a potentially crippling expense for small businesses, in particular.

B. *Quill* Was Correctly Decided.

This Court adopted the physical presence standard in *Bellas Hess* by a 6-3 majority, and reaffirmed it by an 8-1 majority in *Quill*. Although each decision drew a dissent, the logic of the decisions is sound: due to the complexity of state sales tax systems, nationwide tax compliance would impose an undue burden on interstate commerce. This conclusion, supported in *Bellas Hess* by a recent congressional report, and reaffirmed in *Quill* by the mushrooming of local jurisdictions, prompted the Court to require that a company must be physically present in a jurisdiction in order to be subject to that government's tax requirements. *See Bellas Hess*, 386 U.S. at 759-60 and n.14 (citing H.R.Rep. No. 565 (1965)); *Quill*, 504 U.S. at 313-18 and n.6. In *Quill*, that fundamental logic was further reinforced by the important values of *stare decisis*. 504 U.S. at 317-18.

The State attacks the economics of *Quill*, but it fails to credit properly – or simply assumes away – the economic significance for the national market of the collective burdens of state and local tax compliance. *Quill*, 504 U.S. at 312 (nexus for Commerce Clause purposes concerns structural effects on the national economy, not the treatment of individual retailers). The *Quill* rule is not based on "shaky economic reasoning." *See Kimble*, 135 S.Ct. at 2412. The *Quill* Court fully understood the argument that protecting remote sellers from sales tax obligations in states where they have no physical presence purportedly gives them a price advantage over in-state retailers. 504 U.S. at 304

n.2 (referencing the lower court's conclusion that the physical presence standard affords a competitive advantage to out-of-state businesses). The question was whether the burdens of nationwide use tax collection would, in counterpoise, unduly burden such sellers and hinder interstate commerce. The Court concluded that they would.

The State's theoretical argument that the physical presence rule discourages cross-border investment is refuted by the market itself. Today, online retailers face intense pressures to meet the requirements of consumers who demand local presence by a retailer for product access, avoidance of shipping charges, and easy returns. *Infra* at 46-49; Ike Brannon, Michelle Hanlon, Erin Miller, *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers – an Economic Analysis* (March 2018) ("Brannon"), ¶ 34 ("local presence is a key ingredient for providing the competitive customer experience that consumers now demand"), http://ssrn.com/abstract=3140948. Far from avoiding investment, "nearly every successful retailer is racing to be local." Brannon, ¶ 31. Amazon serves as the primary example, but there are many others. *See, e.g.*, Brief of International Council of Shopping Centers, et al., at 14 (detailing online businesses establishing brick-and-mortar locations).

Notably, lower courts have not questioned the validity of the *Quill* standard for sales taxes, or its economic analysis, but rather have declined to apply the physical presence rule to other types of taxes, precisely because such taxes impose lower compliance burdens

on out-of-state companies. *See, e.g.*, *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 325 (Iowa 2010) ("the burden of state income taxation, however, is substantially less" than the burden of collecting and remitting sales tax), *cert. denied*, 565 U.S. 817 (2011); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76, 85 (Mass.) ("the collection of franchise and income taxes did not appear to cause similar compliance burdens" in comparison with sales tax), *cert. denied*, 557 U.S. 919 (2009); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 233-34 (W.Va. 2006) (the burden of sales tax collection is greater than franchise/income taxes and "demands knowledge of a multitude of administrative regulations"), *cert. denied sub nom.*, *FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007). Underlying *Quill's ratio decidendi* is the recognition that nationwide sales tax compliance would unduly burden remote sellers engaged in interstate commerce, and damage the national economy as a result. The physical presence standard minimizes those burdens and serves to promote a national market in which new entrants do not face unreasonable barriers to entry, small and medium-size companies can reach consumers throughout the country, and larger players are not subject to inconsistent and excessive regulation in hundreds or thousands of jurisdictions based merely on having customers there.

C. *Quill* Has Not Been Undermined By Later Decisions.

Quill's doctrinal underpinnings have not eroded. To begin with, *Quill* itself affirmed the Court's decision in *Bellas Hess*, against an attack nearly identical to that leveled by the State here. Moreover, no post-*Quill* decision of this Court has undermined its holding, and the State points to none. *See* Pet. Br. at 24-27.

The Court has in recent years favorably referenced the physical presence standard for use taxes in rejecting a locality's effort to use a federal statute to circumvent the *Quill* rule. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 17 (2010) (city improperly sought to impose civil liability on remote seller under RICO for uncollected use taxes that the company "had no obligation to collect, remit, or pay"); *id.* at 18 (Ginsburg, J., concurring) (noting that the Commerce Clause prohibits the imposition of a use tax collection obligation on an out-of-state seller with no physical presence, citing *Quill* and *Bellas Hess*). In addition, the Court has on more than one occasion cited with approval *Quill's* ruling that the Commerce Clause establishes limitations on state taxing power that differ from the basic requirements of due process. *Comptroller of the Treasury v. Wynne*, 135 S.Ct. 1787, 1798-99 (2015); *Mead-Westvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008).

The State instead argues that *Quill* is inconsistent with the Court's pre-*Quill* jurisprudence, in particular the Court's seminal decision in *Complete Auto Transit,*

Inc. v. Brady, 430 U.S. 274 (1977). *See* Pet. Br. at 22-24. To begin with, all of those arguments were addressed, and rejected, by the Court in *Quill*. 504 U.S. at 313-18; *see also Bay Mills*, 134 S.Ct. at 2037 ("all the State musters are retreads of assertions we have rejected before").

South Dakota and various *amici* assert that the Court should question whether nexus with the taxpayer, as opposed to the transaction, is even properly part of constitutional analysis. Pet. Br. at 22. The argument is a non-starter. After recognizing, again, in *Bellas Hess* – based on a long line of precedents – the "sharp distinction" between retailers with a physical presence in the state and those without, the Court reiterated it in *National Geographic*, three months after issuing *Complete Auto*. *See Nat'l Geographic*, 430 U.S. at 559 (discussing *Bellas Hess*). Four years later, the Court was unequivocal: "the interstate business must have a substantial nexus with the State before *any* tax may be levied on it." *Commonwealth Edison*, 453 U.S. at 626 (italics in original); *see also Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992) (noting that nexus with the activity is a requirement in addition to nexus with "the actor the State seeks to tax") (citing *Quill*). The principle was confirmed most recently in *Direct Mkg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1127 (2015) ("under our negative Commerce Clause precedents, Colorado may not require retailers who lack a physical presence in the State to collect these taxes on behalf of the Department").

D. The Physical Presence Standard Is Not Unworkable.

The *Quill* rule is not difficult to apply. If a company is physically present in a state, directly or through third-parties acting on its behalf to make a market for sales in the state, then the company may be required to collect the state's sales tax. *See,* supra at 11 listing cases. If neither the company nor a third party acting for it is physically present in the state, the State may not compel an out-of-state entity to collect use tax. *Quill*, 504 U.S. at 314-18. For the overwhelming majority of businesses and the vast majority of circumstances, the rule is clear and its application straightforward.

This is not to say that the rule forecloses all litigation regarding its reach. Lower courts have, for example, differed over the question of when a demonstrable, but minimal, physical presence is sufficient to create nexus. *E.g.*, *In re Appeal of Intercard, Inc.*, 14 P.3d 1111, 1122-23 (Kan. 2000) (sporadic employee visits over four years insufficient for nexus); *In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 813-14 (Haw. 2004) (annual three-day customer visits creates nexus). But the recognition of a *de minimis* standard has always been an acknowledged caveat to the "bright line," physical presence test and does not make it "unworkable" in any sense. *Quill*, 504 U.S. at 315 n.8; *see also Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*,

505 U.S. 214, 231 (1992) (state authority to require payment of income tax by remote sellers is subject to a *de minimis* standard). Businesses often must determine whether or not a minimal level of activity will subject them to legal requirements or regulation, such as licensure, permitting, reporting, or disclosure requirements.

Although courts will inevitably be called upon to resolve such disputes when a business' assessment of its obligations differs from the State's, litigation concerning the proper interpretation and application of the physical presence standard after *Quill* has been relatively infrequent. A search on Westlaw among all state courts for the terms "physical presence" and "sales tax" or "use tax" in the same decision turns up fewer than 50 reported decisions from state courts concerning the contours of the physical presence standard for sales/use tax over the 25 years since *Quill* was decided,[4] or less than two reported decisions per year across the entire nation.

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[4] The search returns 86 reported decisions since May 1992, but 32 of those decisions concerned state taxes other than sales and use taxes, despite including a reference to those taxes. Several more include the specified search terms without the issue of a company's physical presence being presented for decision. In addition, some cases involve more than one reported decision within the same appeal.

E. Changed Circumstances Do Not Warrant Overturning *Quill*.

1. Changes In Market Conditions Do Not Alter The Existence Of Unconstitutional Burdens On Interstate Commerce.

While it is evident that the development of the Internet has resulted in significant changes in the retail marketplace since 1992, rapid evolution of the retail market has been accompanied by the continued, even increasing, complexity of state sales tax systems. In other words, while market conditions have changed, the constitutionally-significant conditions that formed the basis for the Court's decisions in *Bellas Hess/Quill* have not changed.

The Court has already squarely rejected the argument that changes in dynamic market factors provide special justification for overruling precedent where the underlying constitutional violation persists. *Bay Mills*, 134 S.Ct. at 2037 (rejecting increase in commercial activity as grounds for disregarding *stare decisis*). Indeed, nearly identical claims regarding the development of remote commerce were made by North Dakota in 1992, in seeking the abrogation of *Bellas Hess*. *See Quill*, 504 U.S. at 303-04, 313-18. By some measures, the market changes then were even more dramatic.

Retail mail order sales had grown from $2.4 billion in 1967 to over $180 billion when the Court heard argument in *Quill*, or more than 75-fold. *See Quill Corp.*, 470 N.W.2d at 209. In contrast, total retail sales, including business-to-business ("B2B") sales, through all

remote sales channels are today about four to five times as large as in 1992. *See* GAO Report at 9, 35. The North Dakota Supreme Court stressed the "tremendous social, economic, commercial, and legal innovations of the past quarter-century" and the creation of "revolutionary communications abilities and marketing methods which were undreamed of," in rejecting the application of the *Bellas Hess* rule to the state statute in that case. *Quill*, 470 N.W.2d at 208 (internal quotations omitted). It stressed Quill's many contacts with the state, including its distribution of 24 tons of catalogs annually to North Dakota residents and its level of sales ($1 million/300 customers) as creating an "economic presence" that justified imposing a use tax collection obligation on Quill. *Id.* at 218-19. This Court rejected those arguments. *Quill*, 504 U.S. at 311-12.

2. The Amount Of Uncollected Tax Is Far Lower Than Previously Estimated And Diminishing Rapidly.

The State uses the rapid expansion of electronic commerce to argue that the amount of uncollected tax on Internet sales is spiraling out-of-control. Pet. Br. at 35. The estimates relied upon by the states have been exaggerated for years. Even more significantly, developments in the marketplace have already rendered the states' claims about lost revenue out-of-date. Both the GAO Report, which includes a specific review of the tax collection practices for every one of the top 1,000 Internet retailers (GAO Report at 41-42), as well as other market data, demonstrate that the State's estimates of

uncollected sales tax nationwide are as much as four times too high. The perceived problem of "lost" use tax is diminishing considerably, due to market forces.

The exaggerated lost revenue claims of the State and its amici derive, ultimately, from a single source: a study done in 2009 (based on 2006 data) by professors at the University of Tennessee ("Tennessee Study"), which was updated in 2012 (using 2009 data). *See* Pet. Br. at 34-35. Once thought by many to be the "gold standard" for estimating uncollected use tax on remote sales, the Tennessee Study has proven no more valuable than tin.

To begin with, the Tennessee Study, on close inspection, has been shown to have many methodological flaws. The Tennessee Study's lead author, Professor William Fox, recently admitted during a deposition in Newegg's Alabama proceeding that the Tennessee Study was paid for by groups committed to overturning *Quill*. *See Newegg v. Ala. DOR*, Appellants' Motion to Exclude Expert Report and Testimony of William F. Fox (Nov. 8, 2017), at 12 (the 2009 Tennessee Study was funded by the Governing Board of the SSUTA and the unpublished, 2012 update was paid for by the Retail Industry Leaders Association). In addition, the Tennessee Study was based on taxability data gathered exclusively from state revenue officials that was woefully incomplete. *Id.* at 12-13 (officials from only 29 states participated, two-thirds of whom were from SSUTA states). The figures used in the Tennessee Study for total electronic commerce also included the "vast number" of non-consumer (largely non-taxable)

B2B transactions that make up the majority of electronic commerce (91.9 percent of ecommerce in 2012 was B2B). *Id.* at 11. The Tennessee Study, however, "did not have any specific data on the B2B companies and their tax behavior." *Id.*

Even more importantly, there have been dramatic changes in the online marketplace with regard to sales tax collection since the Tennessee Study was conducted. Most notably, when the study was published, Amazon.com collected sales tax in only five states (Kansas, Kentucky, New York, North Dakota, and Washington), but now collects sales tax in every state that imposes a sales tax. *See supra*, Isadore. The trend, moreover, is toward even greater sales tax collection by Amazon, which recently committed to commence tax collection on third-party sales on its website for states that adopt laws requiring it. Leslie A. Pappas, *Amazon to Collect Tax on Third-Party Sales in Pennsylvania*, BloombergBNA (Mar. 5, 2018), https://www.bna.com/amazon-collect-tax-n57982089523/; *see* GAO Report at 12 (estimating the largest portion of uncollected sales tax derives from marketplace sales).

Amazon's role in remote sales tax collection is huge, but the market forces contributing to increased sales tax collection on Internet sales are much broader. Online retail is now dominated by larger retailers that collect sales tax. Brannon, ¶ 82 ("most competitive 'online' retailers have trended toward an omnichannel approach consisting of both an internet presence and a local presence. . . . Previous forecasts of potential revenue gains from a tax on internet sales failed to predict

this trend, and thus overstated the impact of the sales tax on remote retailers."). The GAO found that states already receive sales/use tax on between 87 and 96 percent of sales by the top 100 online retailers. GAO Report at 41. Along with Amazon, the large, "omni-channel" retailers that collect state and local sales taxes control the great majority of the Internet marketplace. *See* Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/. Indeed, 19 of the top 20 Internet retailers already collect sales tax in most or all states (*see id.*), as the GAO's research bears out. Moreover, Amazon alone accounts for 60 percent of online sales growth. Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03.

In addition, there are ever-increasing market pressures from consumers for retailers to have a local presence so that customers can access their goods directly, avoid shipping charges, and make returns easily. Consumers prefer to see a product in person before they buy, increasing the pressure for retailers to offer a multi-channel shopping experience. Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125; Brannon, ¶ 21 ("Shoppers increasingly demand an

'omni-channel' experience, enabling them to switch seamlessly across both web-based solutions and physical outfits."). These market pressures result in greater sales tax collection – whether in-store, or online – by the large multi-channel retailers that increasingly dominate the retail marketplace.

A number of the State's amici decry the practice of "showrooming," in which a customer goes to a local store to learn about a product, only to then purchase the product online, perhaps free of sales tax. *See, e.g.*, RLC Br., at 16. Recent studies prove that "showrooming" is dwarfed by precisely the opposite phenomenon ("webrooming"), in which consumers use a website to research a product and obtain customer reviews, and then go to a store to purchase it. MEC Global, *Spotlight on Webrooming* (May 2016), at 4 (consumers are five times more likely to engage in webrooming), http://www.wpp.com/wpp/marketing/consumerinsights/spotlight-on-webrooming/. Forester Research estimated that by 2017, the volume of in-store retail purchases attributable to "webrooming" would be $1.8 trillion, nearly five times the volume of *all* consumer ecommerce. *See* Janet Stilson, *Study Shows Prevalence 'Webrooming,'* Adweek (May 14, 2014) (citing Forester study), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/.

A comprehensive study conducted in 2016 showed that convenience, not tax avoidance, was a far greater reason why consumers chose to shop online. PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016) at 10. Moreover, remote sellers have always

operated at a fundamental cost *disadvantage* to local businesses, because "remote sellers must charge or absorb shipping and handling fees in order to deliver their products to the customer." Brannon, ¶ 15. Consumers place a premium on both the avoidance of shipping fees and immediate access to products they want to buy, putting online-only sellers at a disadvantage compared to local big-box retailers. *See* Ernan Roman, *Webrooming vs. Showrooming: Are You Engaging Both Types of Shoppers?*, CustomerThink (Feb. 23, 2017), http://customerthink.com/webrooming-vs-showrooming-are-you-engaging-both-types-of-shoppers/. These factors demonstrate why the natural growth pattern for emerging online sellers is to establish a local retail presence as their sales increase. Absolunet, *Top Ten Ecommerce Trends for 2018*, ¶ 1 ("Online ('pureplay') merchants will grow their physical footprint as consumers continue to place a premium on both the versatility and depth of online shopping and the convenience of buying, picking up and returning items locally.").

The decreasing level of uncollected sales tax puts the overstated claims of the State in a new light. The GAO estimates the uncollected sales tax for 2017 at between 2 and 4 percent of general sales and gross receipts tax revenues,[5] but the amount is a much smaller

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[5] According to the Central Bureau, state sales tax revenues grew every year from 2013-2016, reaching record levels in 2017. *See* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=STC_2016_00A1&prodType=table; Terence Jeffrey, *State and Local Income, Sales and Property Taxes All Hit Records in 2017*, cnsnews.com (Mar. 22, 2018), https://www.cnsnews.com/

portion of state and local government finances overall. Nationwide, the GAO's estimate of $8.5 to $13.4 billion represents about 0.26% to 0.48% of state and local government expenditures (using 2014 expenditures of $3.626 trillion). *See* United States Census Bureau, American Fact Finder, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SLF_2014_00A1&prodType=table. For South Dakota, whose annual expenditures are on the order of $7.25 billion, the portion of the GAO's estimates attributable to the state are approximately 0.46% to 0.65% of direct expenditures. *Id.* Uncollected sales tax is a small fraction of total government finances, and declining.

F. No Other Standard Provides A More Workable Rule.

The State and its amici argue for the replacement of the physical presence standard by one of two alternative tests: (1) South Dakota's $100,000 sales or 200 transactions statutory thresholds; or (2) the balancing test of *Pike*. Neither test is a workable alternative for preventing the burdens associated with multi-state sales tax collection.

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news/article/terence-p-jeffrey/state-and-local-income-sales-and-property-taxes-hit-records-2017.

1. "Economic Presence" Thresholds Are Fundamentally Flawed.

The State asserts that the Act's economic thresholds are clear, fair, and more economically sound than the physical presence test, and thus a superior means for addressing the burdens on interstate commerce. The dramatic flaws with its approach are, however, readily apparent.

First, although the State touts the $100,000 threshold as reflective of a retailer with substantial national sales, that threshold is undercut by the alternative threshold of 200 transactions. The average value of an Internet order is approximately $84. *See* Statista, https://www.statista.com/statistics/304929/us-online-shopping-order-value/. At that level, a retailer with 200 South Dakota sales would have receipts of only $16,800. Many retailers, especially small sellers, would have lower order values and lower total sales. The statute will sweep in many small businesses.

Second, the thresholds are set by the State itself. The Legislature might reduce the level of required revenues or transactions at any time. Another state or locality may select a lower threshold. Far from a standard of heightened clarity, retailers could confront hundreds of different thresholds across states and "home rule" jurisdictions that could change with the whim of each new legislature, board of selectpersons, or group of county commissioners. Non-uniformity of thresholds – not a single, nationwide constitutional standard –

would be the result. Business planning and settled expectations would be disrupted.

In fact, that is precisely what state and local government officials advocate. "Determining the level of economic activity sufficient to create an economic nexus should be left to the State legislatures, as *this determination is a highly individualized and context-specific inquiry.*" Brief for National Governors Association, et al., at 8 (italics added). Indeed, states have already adopted different thresholds for the imposition of tax collection obligations on remote sellers, some as low as $10,000 and 100 transactions. *See* Wash. Rev. Code § 82.08.053(2) ($10,000 in sales); App. C (100 transactions in Connecticut). Rather than reducing burdens on interstate commerce, "economic presence" standards would increase them. States and localities cannot, consistent with the dormant Commerce Clause, be left to set the limits on their own authority.

Third, thresholds based on sales or transactions would create perverse economic and regulatory incentives. With state tax authority extended to any seller crossing a specified threshold, state and local government officials would have no reason to simplify their tax systems to lessen the burden of compliance on remote sellers. The hard work of the SSUTA would be quickly undone, as simplification and uniformity would seem a needless surrender of autonomy. Moreover, with no lessening of the compliance burdens, remote sellers would have incentives to avoid selling to customers in the most challenging jurisdictions.

Fourth, rather than minimizing litigation, new kinds of litigation would ensue. Retailers would be prompted to challenge the "highly individualized and context-specific" thresholds of different jurisdictions, based on their particular circumstances. The relative burdens may vary across different industries and market segments (*e.g.*, heavy equipment sellers vs. software providers), prompting even more particularized suits. Not only the level of the thresholds, but their application to specific sellers could be subject to interpretation and dispute.

Fifth, the "sourcing" of retail services transactions – now a much larger portion of the economy than retail sales of goods – is a highly perplexing and contentious area of state sales tax law, for which an economic threshold is particularly ill-suited. *See* Brief of David Frutchman as *Amicus Curiae* Supporting Neither Party at 15 ("sourcing and apportioning of sales of services presents a series of complications unparalleled in sales of tangible personal property"). Whether a particular service transaction, or what portion of it (in cases of multiple users in different locations), should be assigned to a state for purposes of the sales threshold could be difficult to determine. South Dakota already taxes services; other states are sure to follow, given the massive potential for revenue from retail services. *Id.* at 5, 20-23. Sourcing of digital products is equally difficult. In sum, economic thresholds are incompatible with the modern economy – which is increasingly digital, service-oriented, and global – absent significant simplification and uniformity of state tax systems.

2. *Pike* Balancing Cannot Work.

While the State does not propose that the Court adopt the balancing test set forth in *Pike*, numerous amici do. The *Pike* test is fundamentally unworkable for addressing the burdens of state sales tax collection. *See Davis*, 553 U.S. at 353-56 (Court is ill-suited to perform complex balancing and economic analyses).

The suggestion by some amici that the Court should analyze the case under *Pike* because sales tax collection is more like a regulatory requirement than a tax payment obligation should be rejected out of hand.[6] *Pike* demands a focus on the "local interest involved" in comparison to the burdens on interstate commerce. 397 U.S. at 142. As the Court recognized in *Bellas Hess* and *Quill*, however, the widespread adoption of sales taxes nationwide requires examination of the aggregate burdens on the national economy of imposing sales tax collection obligations across thousands of

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[6] The United States supports a "virtual presence" theory of nexus for ecommerce vendors that is advocated by neither the Petitioner nor any other amici, and further suggests that the Court should rely on *Pike* to determine the constitutionality of a state law imposing a tax collection obligation on any remote seller. U.S. Br., at 17-24. The United States misapprehends the nature of South Dakota's sales tax, however. *Compare* SDCL § 10-45-2 (sales tax is imposed on the "privilege of engaging in business as a retailer") *with* U.S. Br., at 17 (South Dakota does not "impose a tax liability on the retailer itself"). Also, applying *Quill* to traditional remote sellers, but not Internet vendors, as proposed by the Solicitor General, would violate the ITFA, which expressly forbids "discriminatory taxes on electronic commerce."

potential taxing jurisdictions. Such an analysis is incompatible with *Pike*.

The Court has recognized *Pike's* limitations for making difficult cost-benefit analyses and predicting market effects:

> What is most significant about these cost-benefit questions is not even the difficulty of answering them or the inevitable uncertainty of the predictions that might be made in trying to come up with answers, but the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all.

Davis, 553 U.S. at 355; *see also id.* at 360 (Scalia, J., concurring) (*Pike* balancing is like "deciding whether three apples are better than six tangerines"). For that reason, the Court noted, Congress is the proper forum for such analyses because it "has some hope of acquiring more complete information than adversary trials may produce, and an elected legislature is the preferable institution for incurring the economic risks of any alteration in the way things have traditionally been done." *Id.* at 356. That principle applies strongly in this case, and defeats any argument for the use of the *Pike* test.

II. Congress Remains The Proper Body To Address Whether, And In What Manner, To Alter The *Quill* Rule.

In *Quill*, the Court noted that Congress has the ultimate authority for regulation of interstate commerce, and could change the physical presence standard reaffirmed by the Court if it chose. 504 U.S. at 318-19. The State bemoans congressional inaction (Pet. Br. at 54), but it mischaracterizes the efforts of Congress. For over 20 years, beginning with the adoption of the ITFA and the establishment of the ACEC, and with particular intensity over the past four sessions, Congress has engaged in extensive debate and careful consideration of the proper standards for allowing states to require remote sales tax collection. *See generally* Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement") (describing the "thousands of hours" invested in developing the Committee's proposed "compromise solution"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf; Addendum to Brief of Amicus Curiae of Four United States Senators ("Senators' Brief") (detailing bills and hearings concerning remote sales tax collection). It would be illogical to conclude that because Congress has repeatedly *declined* to change the *Quill* physical presence rule, this Court should now overrule it. *See Kimble*, 135 S.Ct. at 2409-10 (citation omitted) ("long congressional acquiescence" further amplifies the effect of *stare decisis*).

Currently before Congress are three bills that address the remote sales tax collection issue: (1) Marketplace

Fairness Act of 2017, S. 976, 115th Cong. (2017-2018), a version of which passed the Senate in 2013; (2) Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017-2018); and (3) No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018). In addition, the House Judiciary Committee, the committee with jurisdiction concerning proposals for increased state taxing authority over interstate commerce, has developed a set of Principles on Internet Sales Tax, https://judiciary.house.gov/press-release/house-judiciary-committee-releases-principles-on-internet-sales-tax/, and has worked in pursuit of a compromise bill that will address the competing concerns and balance the diverse interests with regard to this complex issue. *See* Goodlatte Statement.

In light of Congress' role in regulating interstate commerce, "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Quill*, 504 U.S. at 318-19. It is only Congress, and not the States or the courts, that has the institutional expertise to weigh the national implications of expanded state taxing authority and to craft legislation that will ensure state tax obligations do not unduly burden interstate commerce. *Kimble*, 135 S.Ct. at 2414 (Congress has the capacity to assess the complexities of the issue and the ability to select the "policy fix, among many conceivable ones, that will optimally serve the public interest.").

Other governments wrestling with the burdens of cross-border tax collection in the Internet era have recognized the need for a comprehensive, legislative

solution to simplify compliance. The European Union has identified VAT compliance for only 28 member countries as being a major impediment to the growth of cross-border e-commerce. In response, the European Commission has proposed a major simplification of VAT administration. European Commission, *Modernising VAT for cross-border B2C e-commerce* (Dec. 1, 2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_757_en.pdf. The plan calls for a single compliance regime for online sellers. At a time when the EU is acting to *remove* tax compliance burdens on cross-border Internet sellers, the Petitioner and its amici seek to *impose* extensive new compliance requirements on the most open, accessible, and dynamic sector of the U.S. economy.

Moreover, the inability of Congress, so far, to reach consensus is attributable, in no small part, to the refusal of the majority of sales tax states and localities to accept any simplification measures not devised by the states themselves.[7] The pursuit of this litigation by

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[7] The Petitioner objects that *Quill* requires states to "beg" Congress to return their sovereign taxing powers. Pet. at 53-54. The State misconstrues the scope of its authority. "By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce *without congressional approval*, [the Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Wynne*, 135 S.Ct. at 1794 (italics and brackets added). *Quill* no more seizes power from the State than *Complete Auto* does; both recognize that state tax authority is subject to constitutional limitations. *Quill*, 504 U.S. at 311, 314 (consistent with *Complete Auto*, *Quill* "furthers the ends of the dormant Commerce Clause").

South Dakota has effectively halted compromise negotiations on legislation that would promote simplification, creating an obstacle to Congress achieving a solution that would advance the interests of all sides to the debate.

III. Overruling *Quill* Presents The Risk Of Crippling Retroactive Liability For Retailers In Over 30 States.

It is well-established that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Harper*, 509 U.S. at 90. Indeed, the fundamental rule of "retrospective operation" has "governed 'judicial decisions . . . for near a thousand years.'" *Harper*, 509 U.S. at 94 (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). "Unlike a legislature, we do not promulgate new rules to be applied prospectively only." *James B. Beam*, 501 U.S. at 547 (Blackmun, J., concurring) (internal quotation omitted).

A ruling abrogating *Quill* would subject remote sellers to potential retroactive liability in at least 30 states, and potentially hundreds of localities. It is a nearly uniform principle of sales tax law that a seller who is properly charged with the obligation to collect sales tax but fails to do so becomes liable for the uncollected tax. *E.g.*, Cal. Rev. & Tax. Code § 6204; N.Y. Tax

Law § 1133(a). Attached as Appendix A is a listing of those states whose laws would require retailers with no physical presence to collect sales taxes, but for *Quill*. In nearly all such states, there is no statute of limitations foreclosing an assessment against a non-filing retailer. *See* App. B.

South Dakota's choice to forego its remedy for back taxes in the event that the Court were to overrule *Quill*, SDCL § 10-64-6, will not limit the retroactive application of such a ruling with respect to other state and local jurisdictions. The issue of remedy is determined with reference to state law. *James B. Beam*, 501 U.S. at 535; *see also Harper*, 509 U.S. at 102 (a state is "free to choose which form of relief it will provide"). Other states and "home rule" localities are free to determine their own remedial approach if the physical presence rule is overturned. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (the Court's determination of constitutionality applies to similar statutes in other States "whether occurring before or after our decision"). The amicus brief of the States in support of South Dakota makes no representation that the states will not pursue remote sellers for back tax liability and, instead, acknowledges that states may seek to impose their laws retroactively. States' Br. at 19.

Indeed, although the Petitioner professes to be unaware of it (Pet. Br. at 20), some states have openly begun to pursue retroactive tax liability in anticipation of *Quill* being overruled. The Connecticut Department of Revenue Services ("DRS") has sent notices to

retailers without a physical presence in the state asserting liability for three years of back taxes, on the theory that the physical presence rule no longer prevents the state from compelling use tax collection by out-of-state sellers who have had more than 100 annual sales transactions with Connecticut customers. *See* App. C. Alabama issued an assessment against Newegg under Alabama's "economic presence" rule asserting six-figure liability for uncollected sales tax. *See* GAO Report at 23 (Alabama Department of Revenue "acknowledges that this action has the potential to allow retroactive enforcement"). In addition, the Massachusetts Department of Revenue recently sent Notices of Intent to Assess to multiple Internet retailers with no physical presence, asserting tax liability starting in October 2017.

There is no meaningful limitation preventing other states from seeking retroactive liability if *Quill* is abrogated. Apart from raw speculation regarding potential obstacles, South Dakota points only to the theory that retroactive liability would be barred as "double taxation" since purchasers are required to self-report use tax when sales tax is not collected. Pet. Br. at 50. The argument is specious. If courts are to assume that purchasers self-report use tax, the entire basis for seeking to compel retailers to collect sales tax evaporates.

No precedent bars the imposition of retroactive liability if the Court overrules *Quill*. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), cited by certain amici, now

has at most only narrow application, and was called into question by both *Harper* and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995) (noting petitioner's concession that "*Harper* overruled *Chevron Oil*" concerning selective, prospective-only adjudication). Several amici, and the State, cite *United States v. Carlton*, 512 U.S. 26 (1994), but its analysis concerning retroactive tax legislation is inapposite here, and the Petitioner argues instead that *Carlton* establishes that taxpayers have no right to protection against retroactive tax laws, *in any context*. Pet. Br. at 51.

The ancient physician's oath, "first, do no harm" is wise counsel here. Affirming the physical presence doctrine protects remote sellers and the national economy from the substantial risks and uncertainties of upending an established standard. The *Quill* rule should remain in place, while Congress formulates legislation to balance the interests of states, remote sellers, and a healthy economy.

CONCLUSION

The decision of the South Dakota Supreme Court should be affirmed.

Respectfully submitted,

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March 28, 2018